

ABC, Inc.

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July 21, 1997

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Ms. Salas:

On behalf of ABC, Inc., transmitted herewith for filing with the Commission are an original and four copies of its Comments in MM Docket No. 98-35.

If there are any questions in connection with the foregoing, please contact the undersigned.

Very truly yours,


Roger Goodspeed

RG/ak
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
1998 Biennial Regulatory Review --)
Review of the Commission's Broadcast) MM Docket No. 98-35
Ownership Rules and Other Rules)
Adopted Pursuant to Section 202 of)
the Telecommunications Act of 1996)

COMMENTS OF ABC, INC.

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July 21, 1998

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To: The Commission

COMMENTS OF ABC, INC.

ABC, Inc. ("ABC") submits herewith its Comments in response to the Notice of Inquiry in the above-entitled proceeding.¹ ABC owns and operates, directly or through wholly-owned subsidiaries, the ABC Television Network, ten television stations and 28 radio stations.

INTRODUCTION AND SUMMARY

The Commission's charge from Congress is to review its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no

¹ MM Docket No. 98-35, Notice of Inquiry, FCC 98-37 (released March 13, 1998) ("Notice").

longer in the public interest."² We offer ABC's comments below on whether the national television ownership rule,³ the dual network rule,⁴ the daily newspaper/broadcast rule,⁵ the local radio ownership rule,⁶ and the television/cable cross-ownership rule,⁷ are still "necessary" to serve the public interest under the current state of competition.

The Congressional directive requiring the FCC to review its broadcast rules was grounded in several fundamental policy judgments: (a) that, as a general proposition, competition is the best way to stimulate innovation and to direct available resources to their highest and best use; (b) that regulations inevitably distort the competitive process and should be maintained only when necessary and only when the benefit to be gained by regulation outweighs the costs of foregoing benefits that would have been created by free competition; and (c) that the competitive landscape in which broadcasters operate has changed so fundamentally that maintaining regulations might well harm rather than serve the

²Telecommunications Act of 1996, 110 Stat. 56 (1996) ("Telecom Act"), sec. 202(h).

³47 C.F.R. §73.3555(e).

⁴47 C.F.R. §73.658(g).

⁵47 C.F.R. §73.3555(d).

⁶47 C.F.R. §73.3555(a).

⁷47 C.F.R. §76.501(a).

public interest.

We agree with those policy judgments. In this proceeding the Commission is re-considering a number of regulations that were promulgated to deal with market conditions that quite simply no longer exist. Even if there ever was a time when owners of broadcast stations or television networks could exercise a form of market power that warranted specific FCC intervention, that time has long since passed. The vastly increased penetration of both cable and the DBS over the past ten years, and the recent surge in Internet use, has led to an explosive growth in the number and diversity of alternatives in every community for news, information and entertainment. Far from dominating the delivery of such services within their markets, individual broadcasters are facing steadily declining audience shares and are increasingly challenged to find new and innovative ways to continue to compete for and hold an audience. And on the network side, of the ten most profitable programming networks over the past year, only one (NBC) was an over-the-air broadcasting network.

The implications of these changes are profound, particularly in light of the Congressional directive to revisit regulation. As the Commission well knows, the revenue needed to support the high quality free over-the-air broadcast system that our nation enjoys is today derived from a single revenue stream -- advertising revenue. Increasingly, broadcasters compete for viewers with those

who can fund their operations (and the product they offer) from at least two revenue sources -- advertising and subscription revenues. For broadcasters to survive in this environment, they must be given the room and flexibility to innovate, and to be creative enough to generate the economic means to maintain the viability of our free over-the-air system. Regulations that constrain such innovation, that impede quests for efficiencies, or that limit the ability to adapt to change will severely undermine (if not doom) broadcaster efforts to remain viable, and hence will carry with them an enormous social cost.

For these reasons, we believe that the Commission should retain a regulation (a) only if such a regulation could be justified today as necessary to address real threats to competition and diversity under current market conditions, and (b) only if after a rigorous cost-benefit analysis the Commission determines that the benefit of the regulation clearly outweighs the costs.

We believe that with respect to four of the regulations at issue -- the national ownership rule, the dual network rule, the daily newspaper/broadcast rule and the local radio ownership rule -- there is ample evidence before the Commission to show that the procompetitive benefits that would flow from deregulation would soundly outweigh any hypothetical injury that might ensue from their repeal or modification. In view of the dramatic growth in the number and strength of competitive outlets there is no longer

any basis to impose such ownership constraints in the name of promoting competition.

In the case of the cable/television cross-ownership rule, however, we believe that at this time, the balance tips differently and that the current regulation should be retained. As the Commission has recognized in its most recent review of the video market, cable is the dominant MPVD. In view of the current competitive landscape, there remains a reasonable basis for maintaining a ban on cable/television cross-ownership in any particular market.

I. National Ownership

The Notice asks for comment on the effect of the national television ownership rule⁸ on competition and diversity and whether it is still necessary in the public interest considering the competition in the television industry. We submit, as we have done previously in our comments in the Commission's ongoing proceeding on TV ownership,⁹ that in today's competitive video marketplace the rule does nothing to foster, and indeed works at cross purposes with, the Commission's goals of protecting competition and

⁸47 C.F.R. §73.3555(e).

⁹Comments of Capital Cities/ABC, Inc., MM Docket Nos. 91-221-87-8 (filed May 16, 1995) ("ABC Ownership Comments"), at 4-19; Reply Comments of Capital Cities/ABC, Inc., MM Docket Nos. 91-221, 87-8 (filed July 10, 1995) ("ABC Ownership Reply Comments"), at 3-17.

diversity.

Because elimination of the national ownership rule would not lead to any concentration of market power that would trigger any concern under established antitrust merger guidelines, retention of the rule can no longer be justified as needed to protect competition. At the same time, retention of the rule would lead to anticompetitive results because it prevents broadcasters from pursuing economies of scale that could generate enhanced financial resources needed to compete more effectively in this increasingly competitive environment. The rule prevents stations from being owned by entities most able to put them to efficient and valuable use -- a result that makes no economic sense -- and imposes an artificially small scale of operation on the broadcast industry. As the Commission concluded in 1984 when it abolished the "seven-station" ownership rule, it is "probable" that group ownership generates efficiencies of scale -- including cost savings from shared facilities, unified corporate services and group sales and purchasing -- that can foster improved news gathering, editorializing and public affairs programming.¹⁰

Diversity considerations do not alter these conclusions. Common ownership across markets would do nothing to lessen outlet diversity in any market. Indeed, if anything, the evidence shows

¹⁰Report and Order, 100 FCC2d 17, 56 RR2d 859 (1984) ("1984 Ownership Order",), par. 82.

that group owners generally tend to promote diversity. The primary focus of the Commission's diversity concerns is local news and public affairs programming. Group-owned stations generally devote more time to such programs than non-group-owned stations.

The Commission's Notice cites to a table showing increased joint ownership of television stations under the new 35% cap established by the Telecom Act.¹¹ However, the Notice cites no evidence (and we believe there is none) that any demonstrable reduction in competition or diversity has ensued from the joint ownership. We believe that the record in this proceeding strongly supports immediate repeal of the national ownership rule. If the Commission should decide that a transition period is desirable, it should immediately raise the national cap from 35% to 50%¹² and establish a date certain for automatic sunset of the rule.

A. The Continued Dramatic Growth in Video Outlets and Competition Supports Elimination of the Rule

In view of the continued and accelerating increase in competition in the video market, and the concomitant loss in market share by broadcast television, there is no longer any legitimate concern that increasing the national ownership cap would harm

¹¹Notice, par. 15.

¹²We note that as far back as 1992, the Commission considered an increase of the national ownership cap to 35% as a "moderate approach." Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992) ("1992 Ownership Notice"), pars. 11-12.

competition.

In 1991, the Commission sponsored the OPP Working Paper No. 26, "Broadcast Television in a Multichannel Workplace," which examined the competitive situation in the television broadcast industry from 1975 to 1990, assessed the likely industry trends, and suggested appropriate regulatory action.¹³ Based on its analysis and predictions -- including its central finding that in the 1990's broadcasters would be increasingly unfairly hampered by Commission regulations in competing with other video providers -- the OPP Working Paper recommended that the Commission should eliminate its broadcast multiple ownership rules.¹⁴

The working paper made that recommendation against what was then perceived to be sufficiently robust competition from other video providers. By 1990, cable systems passed 91.2% of television households, 61.4% of those households subscribed to cable,¹⁵ and cable systems' advertising revenues were estimated at \$635 million.¹⁶ Yet satellite delivery was still in its infancy. Satellite video transmissions were made exclusively to C-band home satellite dishes, typically 10 feet in diameter and costing, for a

¹³Setzer & Levy, "Broadcast Television in a Multichannel Marketplace", OPP Working Paper No. 26, 6 FCC Rcd 3996 (June 1991) ("OPP Working Paper").

¹⁴OPP Working Paper at 169-171.

¹⁵Id. at 70.

¹⁶Id. at 73.

complete reception system, between \$2000 to \$4000.¹⁷ An estimated 3 million C-band home satellite dish systems were in use in 1990. At that time the Ku-band direct broadcast satellite industry -- the distribution of programming to small home dishes -- was still in the planning stages.¹⁸

In the eight years since the working paper recommended elimination of the multiple ownership rules, competition from non-broadcast outlets has only increased -- and significantly so. By 1997, there were almost 10,000 cable systems passing over 94 million homes, representing about 97% of television homes.¹⁹ Cable subscribership and penetration (the proportion of the homes passed that subscribe) has steadily increased in recent years, reaching 64.2 million and 68.2% respectively by 1997.²⁰ Direct broadcast satellite subscribership -- a competitive force that did not exist in 1990 -- reached 5.1 million homes in 1997.²¹

¹⁷Id. at 94-97.

¹⁸Id. at 93.

¹⁹Fourth Annual Report, CS Docket No. 97-141, released Jan. 13, 1998 ("1997 Video Rep."), pars. 14-16. By comparison, in 1984, there were only 6400 cable systems, passing 64% of homes. 1984 Ownership Order, par. 35.

²⁰1997 Video Rep., par. 15. Roughly 88% of television homes have at least one VCR, compared to a minimal percentage in 1984. Id., par. 103; 1984 Ownership Order, par. 35.

²¹1997 Video Rep., par. 55. Home satellite dish subscribership amounted to roughly 2 million in 1997, slightly down from the level in 1996. Much of the HSD decline results from owners switching to DBS service. Id., pars. 69-70.

The result of that increased competition (as the OPP Working Paper predicted) has been the continued erosion of broadcast viewership and revenues compared to other major video providers. In the 1990-91 television season, the time of the OPP Working Paper, the four major broadcast television networks achieved a combined share of 73% of prime time viewing; in 1997 that share shrank to 59%.²² In 1990-91, the sign-on/sign-off viewing shares for basic cable and broadcast stations were 24 and 77 respectively. By 1997 those shares were 36 and 67%.²³ Advertising revenues for television broadcast stations in 1996 amounted to about \$33 billion, 32% over 1990 revenues. Cable networks' advertising revenues increased 139% in the same period to about \$3.3 billion.²⁴

As the Commission noted in 1992, when the competitive environment was considerably less intense, "the primary concern

²²An Economic Analysis of the Prime Time Access Rule, filed March 7, 1995 by Economists Incorporated in MM Docket No. 94-123 ("EI PTAR Analysis"), Appendix A, Table A-1.

²³1997 Video Rep., pars. 18, 92; EI PTAR Analysis, Appendix A, Table A-9; First Report, FCC 94-235, 75 RR2d 1415 ("1994 Video Rep."), par. 97.

²⁴Marketer's Guide to Media-1997-98, Vol. 20 (1997) at 9-12. Between 1987 and 1996, cable advertising revenues grew explosively, while broadcast television station revenues showed only modest growth. Cable network revenues grew from \$760 million to \$3.3 billion, an increase of 338%. Local cable advertising revenues were \$203 million in 1987 and \$1.03 billion in 1996, an increase of 404%. During the same period, broadcast spot grew 43%, and local spot increased 59%. Broadcast television's share of total advertising sales (including all paid media) actually declined from 1987 to 1996, from 6.7% to 6.2%, while network and local cable went from a .5% share of the total market to a 1.25% share. Id.

underlying the national ownership rule -- preventing economic concentration and consequent harm to diversity -- may have abated with the proliferation of television stations and alternate sources of video programming."²⁵ That conclusion is even more valid today.

B. The Economic Markets

In its 1995 Further Notice on the broadcast ownership rules, the Commission defined three economic markets as relevant for its analysis of competition in the video industry: delivered video programming, advertising and video program production.²⁶ In connection with its comments to the Commission, ABC (jointly with CBS, NBC and Westinghouse) sponsored an economic analysis by Economists Incorporated (the "EI Analysis") that concluded that there was little reason to believe that eliminating the national ownership rule would lead to anti-competitive effects.²⁷ Recent market developments substantially strengthen that conclusion.

With respect to the delivered video market, the EI Analysis calculated the maximum theoretical Herfindahl-Hirschman Index ("HHI") for broadcast stations, if all the stations in markets

²⁵1992 Ownership Notice, par. 11.

²⁶See Notice, par. 5; Further Notice of Rulemaking, MM Docket Nos. 91-221 & 87-8, 10 FCC Rcd 3524 (1995) ("1995 Further Ownership Notice"), par. 22.

²⁷EI Analysis at 60-62, Tables 8, 9. See ABC Ownership Comments at 9-10.

throughout the country competed with each other (they do not), at 831, well below the level at which the Justice Department will find evidence of a concentrated market.²⁸ The number of competing broadcast stations has increased since 1995, resulting in even more competition in the broadcast service.²⁹ Thus under the same analysis, the broadcast television HHI would now be even lower.

With respect to the advertising market, the market was, at most (and using the Commission's very narrow definition of the market), only moderately concentrated in 1995.³⁰ By the Commission's own current calculation, estimated broadcast station revenues suggest a very low HHI of 308.³¹

Several recent circumstances suggest the trend is toward even less concentration. As noted above, network and local cable

²⁸See Notice, par. 15, note 21; EI Analysis at 60-61 (calculated using total of 1,033 full-power commercial stations in operation).

²⁹Video Rep., par. 91; Third Annual Report, CS Docket No. 96-133 (1996) ("1996 Video Rep."), par. 86; Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060 (1995) ("1995 Video Rep."), par. 112.

³⁰See EI Analysis at 28, Table 4. In the 1995 Further Ownership Notice the Commission included only video media, and only advertising carried on broadcast networks, program syndication and cable networks, in its definition of the relevant advertising market. 1995 Ownership Further Notice, par. 37. The EI Analysis made a persuasive case that a correctly defined advertising market would include national spot advertising and several categories of non-video advertising such as radio and print. EI Analysis at 18-23, Appendix D.

³¹Notice, par. 15.

advertising revenues have been taking an increasingly larger share of all advertising buys. As DBS subscribership increases, it is emerging as a new competitor in the video advertising market,³² as is the Internet as its usage continues to escalate exponentially.³³

The EI Analysis showed that in 1995 the video program production market was unconcentrated: The HHI was below 800. Since that calculation, the potential buyers of video programming have increased. There are more national networks, cable networks, television stations and DBS operators now than there were in 1995.³⁴ The HHI today would clearly be even lower indicating an even less concentrated market.

C. Diversity

Common ownership of television stations across markets would do nothing to lessen outlet diversity in any local market.³⁵ Indeed there is evidence that, if anything, group ownership tends to promote diversity.

³²Hogan, "DBS Providers Flirt With Selling Ad Time," Multichannel News, Feb. 23, 1998.

³³Online advertising reached \$906.5 million in 1997 (Advertising Age, April 6, 1998), and is projected to reach \$6.5 billion in 2001 (USA Today, June 19, 1998).

³⁴See 1994 Video Rep., pars. 21, 61, 97, 99; 1997 Video Rep., pars. 19, 54-55, 91-92.

³⁵EI Analysis at 83.

The Commission has previously determined that significant diversity effects are to be evaluated on a local market basis. Thus, the primary focus of the Commission's diversity concerns is local news and public affairs programming.³⁶ There is no evidence that common ownership interferes with the delivery of such programming. To the contrary, there is evidence that group-owned stations devote more time to such programs than non-group-owned stations.³⁷ And this makes sense.

To start with, self-interest provides all the incentive necessary to encourage group owners' investment in local news because commercial success for local broadcast stations is tied to news leadership. To meet the demand for local news, and thus insure commercial success, group owners can be expected -- and do -- hire local managers who are responsive to local community needs. And, perhaps most importantly, group owners that have lower costs as the result of economies of scale and scope have -- and tend to devote -- more resources to pursuing these objectives.³⁸ For these very reasons, the Commission has recognized that "group television station owners generally allow local managers to make editorial and reporting decisions autonomously and that group-owned stations are

³⁶ 1995 Further Ownership Notice, par. 72; Notice 52.

³⁷ EI Analysis at 79-80.

³⁸ EI Analysis at 83.

more likely than others to editorialize."³⁹

There is substantial evidence that group owners have strong incentives, as a matter of self-interest, to devote as much or more attention and resources to local news than non-group news. A study by the ABC Affiliate Marketing and Research Department shows the unmistakable correlation between local news performance and commercial success. The study chose 40 markets (markets 1-10, 41-50, 91-100 and 141-150) as illustrative of television markets generally. In those markets, it compared local news performance, represented by ratings for the local early evening news, with overall commercial success, represented by ratings leadership sign-on to sign-off, 7:00 AM to 1:00 AM.⁴⁰ In 35 of the 40 markets, the station with the number one early local news program was also the number one station sign-on to sign-off. Notably, over 85% of the news leaders are group-owned stations (i.e., one of at least three commonly-owned stations). In markets 1 through 5, the news leader

³⁹1995 Further Ownership Notice, pars. 62, 96. See 1984 Ownership Order, pars. 51, 61-63, 100; EI Analysis at 78-80.

⁴⁰A copy of the study is attached hereto as Exhibit A. See also 1984 Ownership Order, par. 44 (noting that group-owned stations' higher ratings for local news programming "suggests that group-owned stations do a superior job of responding to viewer demand for news"); McAvoy & Green, "Fox Affiliates Gamble on News," Broadcasting & Cable, Sept. 15, 1996, p. 38 (Fox affiliates generate new advertising revenues and improve image in community with local news programs); Spring, "Affiliate Success Depends on Local News," Electronic Media, June 10, 1996, p. 3 (quoting Rupert Murdoch at Fox affiliate meeting that local news is crucial to affiliate stations' success).

is a network-owned station.⁴¹

In addition to local broadcasters, there is another growing source of local news and public affairs programming -- local cable news channels. In September 1997, the NCTA listed 13 local news channels not including at least a dozen more programmed by local TV stations.⁴² A more recent April 1998 report states that "cable systems are rapidly adding channels all across the country that report local news all day long" and that such channels "now operate in seven of the nation's 10 largest cities, reaching nearly 20 million homes."⁴³

Any lingering concerns that increased common ownership could somehow adversely impact diversity would be more than adequately

⁴¹The Commission has consistently recognized the public interest benefits of efficiencies available through multiple ownership of broadcast stations. See Report and Order, 7 FCC Rcd 2755 (1992), pars. 38-39; Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1723, 65 RR 2d 1589, pars. 39-45, 54-61, 6467 (1989), modified on reconsideration, 66 RR 2d 1115 (1989); 1992 Ownership Notice, par. 11. In the 1984 ownership proceeding commenters made several showings that persuaded the Commission that group-ownership of stations fosters increased news and public affairs programming. 1984 Ownership Order, pars. 45-55. See also EI Analysis at 78-80. The Commission noted in 1984 that no opponent to the increase from the seven-station to the twelve-station ownership limit had produced any "evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming, or editorialize more frequently on subjects of local interest, or produce more news, investigative journalism, or issue-oriented programming." 1984 Ownership Order, par. 53.

⁴²"Anxiety in Newsville," Daily Variety, Sept. 25, 1996, p.1.

⁴³"Regional Channels Change How 'Hometown News' Hits Home," Associated Press, April 5, 1998.

addressed through antitrust enforcement. There is no need for the imposition of a separate Commission rule. The potential impact on diversity must necessarily be analyzed on the basis of a market definition that is at least as broad as market definitions typically applied for antitrust purposes. Indeed, the number of outlets in any local area that contribute to diversity would encompass all media available to consumers, including those located outside the area but which serve the area. Thus, television, cable, DBS, MMDS, radio, videocassettes, newspapers, yellow pages, direct mail, outdoor and, increasingly the Internet, all must be taken into account for diversity purposes to the extent there is a local outlet or local distribution. The relevant market for antitrust analysis would be no broader than the market for diversity purposes and might be narrower. For example, the Commission has properly defined video-program production to include only purchasers of video programming,⁴⁴ whereas the number of outlets would quite obviously include radio and newspapers and other media that contribute to diversity. Thus, under such a market definition, antitrust enforcement under the US merger Guidelines would ensure that undue economic concentration would be foreclosed well before there was any material effect on diversity.⁴⁵

⁴⁴EI Analysis at 39.

⁴⁵See EI Analysis at 58-59, 83.

D. UHF Discount

When the Commission reexamined the old "seven-station" national ownership rule in 1984 and 1985, it concluded that repeal of the rule would not adversely affect the Commission's traditional objectives of diversity and competition, and indeed could well further those objectives.⁴⁶ To avoid potentially disruptive restructuring of the broadcast industry, however, the Commission created a 12-station cap for television ownership for a six-year sunset period.⁴⁷ On reconsideration, the Commission elected to eliminate the automatic sunset of the national ownership rule and to add a 25% national reach cap.⁴⁸

In considering the administration of the audience cap, the Commission recognized the "inherent physical limitations" of UHF stations, compared to VHF stations, in their ability to deliver to deliver viewable signals, and accordingly decided to apply a 50% discount to UHF stations' audience reach in applying the national cap.⁴⁹ Notably, the Commission cited no engineering data or made any analysis to tie the discount to the actual physical reach

⁴⁶1984 Ownership Order, pars. 63, 86, 108.

⁴⁷Id., par. 110.

⁴⁸Memorandum Opinion and Order, 100 FCC 2d 72, 57 RR 2d 966 (1985) ("1985 Ownership Reconsideration Order"), pars. 36-40.

⁴⁹Id., par. 44. Since the 1985 creation of the UHF discount, the Commission has often noted that improvements in reception equipment and increased cable penetration have considerably reduced the UHF handicap. See 1995 Further Ownership Notice, par. 102.

limitations of the UHF service as compared to VHF television. Indeed, there appears to be no engineering study or other empirical evidence ever considered by the Commission to justify its choice of a 50% discount.

The Commission has recognized on numerous occasions that there are a number of factors that may have reduced the VHF-UHF disparity.⁵⁰ In our view, one factor standing alone -- the growth in cable penetration -- has made the discount insupportable. With cable subscribership today over 68%,⁵¹ the disparity, if it exists, would be limited to the remaining 32% of over-the-air homes. Even making a worst case assumption that only half those homes can receive UHF stations (although the percentage is likely to be much higher for the reasons we discuss below), one is left with the irrational result that a 50% discount is being applied to rectify what is, at worst, a 16% disparity.

There is evidence that the disparity is even less than 16%. In non-cable homes, improvements in receiver design have helped reduce VHF-UHF propagation differences.⁵² Moreover to the extent the disparity exists, it varies from region to region and even

⁵⁰See, e.g., 1995 Further Ownership Notice, par. 102; Notice, par. 26, note 33.

⁵¹1997 Video Rep., par. 15.

⁵² Over the years, the Commission has taken many actions aimed at encouraging the technical improvement of UHF reception. The current rule requires that all TV sets comply with a maximum noise figure of 14 db for channels 14 to 69. 47 CFR Sec. 15.177(g).

market to market. Applying one rule across the board, particularly a 50% discount, cannot be justified. For example, consider the differences under FCC rules in maximum effective radiated power for VHF stations among three geographic zones. In Zone I, at a 2000 foot antenna height, VHF stations are limited to 10kw (in the case of channels 2-6) and 31.6kw (in the case of channels 7-13). These limits are one-tenth the maximum power VHF stations are permitted in Zones 2 and 3. In contrast, subject to taboo restrictions, UHF stations at a 2000 foot antenna height are permitted to operate at a maximum of 5,000kw throughout the country including Zone 1.⁵³ This power differential, which favors UHF stations, makes it apparent that in Zone 1 it would be far off the mark to generalize that UHF stations have only half the over-the-air coverage of VHF stations.

Based on the evidence, we believe that there is no rational basis for retaining the existing 50% discount. Given the overwhelming evidence that erodes the assumptions on which the discount was based, we believe that the best course is to eliminate the discount in its entirety.

The only other rational alternative would be to replace the discount with a rule that takes a market- by-market approach to estimating coverage disparities. Since the Commission adopted the UHF discount, the techniques for estimating broadcast stations'

⁵³ 47 CFR Sec. 73.614(b).

true coverage areas have undergone great technological advance. The Commission applied these techniques, such as the Longley-Rice propagation model, in designing the DTV Table of Assignments. Compared to a 50% UHF discount rule, which is a crude, overgeneralized measure that ignores market-by-market and station-by-station variations, Longley-Rice is a sophisticated common standard applicable to both VHF and UHF stations that would fairly account for all such variations.⁵⁴

The Commission also requests comment on whether, if the UHF discount is eliminated, group owners that exceed the new limits should be grandfathered. The question would arise, of course, only if, contrary to the arguments above, the Commission elected to maintain some national ownership cap. It is in that context that we respond.

The answer to the "grandfathering" question should start with the bedrock principle that when the Commission adopts new rules of general applicability the rules should apply equally to all. Grandfathering is an exception to that principle which is justified in very narrow circumstances when requiring divestiture would be unfair or inequitable. In the case of the UHF discount, the Notice points out that some broadcasters would exceed the national reach

⁵⁴Such a propagation model approach would undoubtedly impose some administrative burden. We believe that the existing VHF/UHF disparity may not be significant enough to warrant such a level of Commission effort, lending further support to our position that the discount ought to be scrapped.

cap (if it remains at 35%) were it not for the discount. The Commission cites Fox and Paxson.⁵⁵ If one examines the pattern of station acquisitions of both groups, it is clear that grandfathering cannot be justified.

Without accounting for the UHF discount, Fox stood at a national reach of 27.49% and Paxson at 27.67% on March 8, 1996 when the Commission released its Order to implement the changes in the national ownership rule mandated by the Telecom Act.⁵⁶ In that Order, the Commission noted that the Telecom Act was silent with respect to the UHF discount and that the matter was under consideration in the Commission's outstanding proceeding reviewing the television ownership rules. The Commission put group owners on clear notice in the Order that "any entity which acquires stations during this interim period [i.e., prior to the outcome of the television ownership proceeding] and which complies with the 35% audience reach limitation only by virtue of [the UHF discount] will be subject to the outcome in the pending television ownership proceeding."⁵⁷ Both Fox and Paxson acquired the additional stations that, absent the UHF discount, would have put them over the current

⁵⁵Notice, par. 27.

⁵⁶See Exhibits B and C hereto. With the UHF discount, as of March 8, 1996, Fox stood at 21.97% of national coverage and Paxson stood at 13.84%.

⁵⁷Order, FCC 96-91, 2 CR 363 (released March 8, 1996), par. 4.